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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TIMOTHY D. SALTSMAN, *et al.*,

Petitioners,

v.

DAWN CAMPBELL, *et al.*,

Respondents.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the advice of counsel to succumb to a threat by police officers turn an otherwise coerced entry into one which has been gained by free and voluntary consent?

PARTIES TO THE PROCEEDING

Plaintiffs and Petitioners are Timothy D. Saltsman, Tina Saltsman, Individually and as Parents and Natural Guardians of Ashley Saltsman and Timothy D. Saltsman II. Defendants are Dawn Campbell, Individually; Larry Henning and Scott Dewitt, Individually; St. Johns [Michigan] Police Department; Michael Madden, Individually and in His Official Capacity as the Chief of Police of the St. Johns Police Department.

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No._____

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v.

DAWN CAMPBELL, *et al.*,

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Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on May 12, 1998.

OPINIONS BELOW

The decision of the court of appeals is

unreported. *Saltsman v. Campbell,* No. 97-1857 (6th Cir. May 12, 1998). The decision of the district court is likewise unpublished. *Saltsman v. Campbell*, No 5:96-CV-63 (W.D. Mich. July 15, 1997).

BASIS FOR SUPREME COURT JURISDICTION

The Sixth Circuit Court of Appeals judgment sought to be reviewed is an order affirming summary judgment in favor of the defendants that was entered on May 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Amendment IV:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This civil rights complaint seeking monetary damages and equitable relief was filed under 42 U.S.C. § 1983 in the United States District Court for the Western District of Michigan. Jurisdiction of the district court was granted under 28 U.S.C. §§ 1343 (a)(3) and 1343 (a)(4). Plaintiffs' claims arise from an allegedly illegal warrantless entry in a child welfare investigation by three local officials—two police officers and a social worker. On cross-motions for summary judgment, the district court granted judgment for the defendants on July 15, 1997, holding that there was no violation of the plaintiffs' Fourth Amendment rights because "the totality of the circumstances . . . do not as a matter of law, establish that Mrs. Saltsman's consent was coerced." (App. at 22a). The Sixth Circuit Court of Appeals affirmed the district court on May 12, 1998, also finding that there was no violation of the plaintiffs' Fourth Amendment rights. The Sixth Circuit acknowledged Mrs. Saltsman's testimony that her consent was coerced by threats from the officers, but validated the consent because "Mrs. Saltsman conversed

privately with her attorney from the inside of the home. . . . ." (App at 6a). This petition for certiorari was timely filed on August 10, 1998.

FACTS

An anonymous tipster called the Clinton County [Michigan] Department of Social Services (DSS) on the morning of March 21, 1996, reporting that the home of Timothy and Tina Saltsman was in a "deplorable" condition. DSS did not consider the report to present any emergency circumstances warranting immediate action. In fact, DSS later admitted that in other counties in Michigan, the report might not have even been considered sufficient to merit an investigation.

On the following morning, Defendant Dawn Campbell, an investigator with DSS, was assigned to investigate the report. She went to the Saltsman home at approximately 4:00 p.m. When Campbell arrived, Mrs. Saltsman was at home with three of her own children plus two children of a friend.

Campbell announced to Mrs. Saltsman that she was from DSS and was there to investigate a complaint. Mrs. Saltsman stepped onto the front porch to discuss the matter with Ms. Campbell. Campbell asked to come inside instead. Mrs. Saltsman refused to allow entry, prompting Campbell to reply that she "would, more than likely, be back with the police."

Less than thirty minutes later, two uniformed St. Johns city police officers and Ms. Campbell arrived at

the Saltsman home in three separate vehicles.

While Campbell was gone, Saltsman locked her front door and called an attorney. She was talking to the attorney, David Gordon, on a cordless phone when the two police officers arrived with the returning social worker. Gordon remained on the phone during the entire episode.

When Mrs. Saltsman saw the officers and the DSS investigator arrive, she walked around the house from the back door and met them on her front porch. The trio said "they needed to come into the home" and one of the officers placed his hand on the front door knob, but could not enter because it was locked.

Mrs. Saltsman responded to the request for entry by asking the police officers whether they had a warrant or court order authorizing their entry. They replied that they had neither and added that they did not need a warrant because they were there with the social worker.

Saltsman's attorney then suggested that Mrs. Saltsman bring her children to the door to allow the three officials to see that the children were not in any imminent danger. Since her front door was locked, Mrs. Saltsman led the officials around the house to her back porch. She went into her home and returned to the back porch a few minutes later with one of her children. Unsatisfied, the officials repeated their demand to enter the home. One of the officers admits telling Mrs. Saltsman that they "would get in one way or another."

Gordon then asked Mrs. Saltsman to give the phone to one of the officers. Gordon told the officer that he had no legal authority to enter the home absent a warrant or other court order. The officer told Gordon, *inter alia*, that they did not need a warrant because they were with the social worker. Mrs. Saltsman could obviously hear all of the officer's statements since she was just a few feet from where he was speaking on her cordless phone. The officer returned the phone to Mrs. Saltsman.

When Mrs. Saltsman still refused to permit entry, one of the officers told her that if she did not let them in the house, they would take her children away.[1] Gordon also heard this threat over the portable phone.

After hearing this threat, Mrs. Saltsman closed the back door to have a private conversation with her lawyer. Gordon advised her to let the officers in the house because he "did not think it was worth that risk." During this conversation—which lasted no more than thirty seconds—one officer and Campbell walked toward their cars to try to decide what to do next. The other officer went to the front porch and was about to knock on the door again, when Mrs. Saltsman opened her front door, stepped outside and threw up her arms. She then stepped aside and allowed the two officers and the DSS

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[1]This statement was contested by the defendants. However, since this case was decided on the defendants' motion for summary judgment, the testimony of Gordon and the plaintiff must be considered to be true at this stage of the proceedings.

investigator to enter her home.

After a brief walk through the home, and a short interrogation of Mrs. Saltsman concerning her home education, the officials left. Campbell concluded that the anonymous report of child neglect was "unsubstantiated" and filed a report closing the investigation.

REASONS FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S DE FACTO BRIGHT-LINE TEST—A LAWYER'S ADVICE PURGES ALL COERCION—CREATES DANGERS TO THE POLICE AND PUBLIC, AND IS CONTRARY TO THE BASIC PRINCIPLES OF THE RULE OF LAW.

This Court looks to the totality of circumstances to determine whether consent to enter and search has been coerced or given voluntarily. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The undisputed facts paint a picture of heavy coercion.

All three officials admit that the police told Mrs. Saltsman that they had the right to enter without a warrant and that they would get in "one way or another." The coercive nature of these actions was made clear in *Schneckloth*.

> [I]f under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of authority then we

have found the consent invalid and the search unreasonable.

412 U.S. at 233.

In his deposition, Officer Dewitt attempted to ascribe a benign intention to his exclamation, "we will get in one way or another." However, the effect of his threat is judged not by his subjective intent but by the objective result his words would have on a reasonable person in Mrs. Saltsman's position. See, e.g., *Michigan v. Chesternut,* 486 U.S. 567, 576 (1988)("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that intent has been conveyed to the person confronted."). A reasonable citizen, upon hearing an armed police officer state that he was going to gain entry "one way or another," would interpret this to mean that the officer had threatened to use force to enter if necessary.

Even if there had never been a threat to take the Saltsman children, the total atmosphere created by the prior claim of authority and threat of forcible entry had poisoned any consent to enter with substantial coercion.

The question which deserves this Court's plenary consideration flows from the police threat to take the Saltsman children, followed by the immediate advice of counsel to let the police in because the risk was too great. Mrs. Saltsman's physical act of surrendering the sanctity of her home to the persistent officers came no more than 30 seconds after the threat to take her children.

The Sixth Circuit isolated the fact that the opening of the door came upon the advice of counsel. But this advice was not given in a vacuum and cannot constitutionally be considered outside the totality of the circumstances.

The attorney testified that his counsel to open the door was given to avoid the threat of harm which he had heard moments before. In the ordinary case, advice from counsel to consent to a search should be considered a factor to be placed on the "free and voluntary consent" side of the scale. However, when the attorney testifies that he heard the officers utter a contemporaneous threat of harm, his advice to open the door in response thereto must be placed on the "coercion" side of the scale.

Rather than attenuating the prior coercive acts and statements, this sequence of threat-legal advice-surrender is even greater evidence of enormous coercion on a mother with young children.

This Court should grant certiorari to review and correct the Sixth Circuit decision not merely because it is legally erroneous, but because: (a) it creates substantial danger for the police and public, (b) it represents a forbidden bright-line test for Fourth Amendment analysis; and (c) it creates a split in the circuits.

A. THE SIXTH CIRCUIT'S DECISION EMBRACES A DE FACTO "BRIGHT-LINE" RULE IMMUNIZING ALL ENTRIES AS CONSENSUAL WHENEVER AN ATTORNEY HAS GIVEN ADVICE TO PERMIT THE SEARCH.

Although the decision below does not declare an explicit "per se" rule that an attorney's advice always purges police coercion, the pragmatic effect of the decision is a de facto bright-line test which reaches this result.

This Court has repeatedly rejected all forms of "bright-line" or "per se" tests in the context of Fourth Amendment jurisprudence. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385 (1997); *Ohio v. Robinette*, 519 U.S. 33(1996). The ultimate standard of reasonableness requires a case-by-case consideration of the totality of circumstances.

Petitioners recognize that generally a lawyer's advice to permit a search should be weighed as a factor in favor of finding that consent to enter was given on a free and voluntary basis. But unless there are exceptions, it becomes a per se rule. If ever an exception is to be granted, this case must be one. An attorney's advice to open the door because of a threat to take one's children is given not because consent is legally required, but because it is the only course that is not fraught with physical harm.

Of course a lawyer could tell the client to specifically advise the police that they are being allowed

in the home under duress and without consent. Mrs. Saltsman's physical gesture of walking out her front door and throwing up her hands implicitly delivered just that message. But to require attorneys and clients to give police a formal statement that they are surrendering the home under duress as a condition of retaining Fourth Amendment rights simply cannot be countenanced in light of this Court's decisions when the tables are reversed. In *Ohio v. Robinette*, *supra*, this Court rejected a requirement that police officers must always inform a citizen of his right to leave as the "*sine qua non* of an effective consent." 519 U.S. 33, 136 L.Ed.2d at 355. Knowledge of such rights is simply "one factor to be taken into account." *Id.* "[I]t would be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." *Id.* By the same token, it would be unrealistic to require a citizen who has been advised by a lawyer to permit a search in response to a threat to give a formal statement of duress as the *sine qua non* invalid consent.

It does not matter which version of the bright-line rule results from the opinion below—"whenever a lawyer advises a client to open the door the consent is voluntary," or "whenever a lawyer advises a client to open the door, the consent is voluntary, unless a formal statement of duress is given." Either way, the result is still a bright-line rule rather than a determination based on the totality of circumstances.

Unless a lawyer's advice to permit a search is going to operate as a per se rule, then this is the

occasion to declare an exception.

B. THE SIXTH CIRCUIT'S RULE PLACES POLICE OFFICERS, CITIZENS, AND THE RULE OF LAW IN GRAVE DANGER.

In *Maryland v. Wilson*, 519 U.S. 408, 137 L.Ed.2d 41, 46 (1997), this Court said:

> the touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. . . . and that reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. (Internal citations omitted).

This case presents the nearly unique circumstance where there is no need to strike a balance since both the public interest and the individual's right to personal security lead to the same result. The Saltsmans' right to the safety and security of their family home is the clearest and highest value of the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 576 (1980). But, we would also suggest that the public interest is also best advanced by the result sought by the Saltsmans.

Construing a lawyer's advice to succumb to a threat by police officers as a basis for finding that Mrs. Saltsman gave free and voluntary consent is contrary to the public interest in two important areas: (1) the need

for physical safety for the police and public[2]; and (2) the fundamental preference for the use of the rule of law rather than raw physical power to settle disputes between police and citizens.

In oral argument in the Sixth Circuit, counsel for plaintiffs asserted that there was no legal difference between the threat to take one's children and a threat by police declaring to "open up or I'll shoot." Counsel

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[2]The inherent danger to police in this situation is akin to that recognized in a slightly different context by Justice Jackson's concurrence in *McDonald v. United States*, 335 US 451, 460-461 (1948):

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

stated that an attorney's advice to resist such a threat would be foolhardy. A member of the panel replied that he would advise his clients to tell the police to go ahead and shoot.

With all due respect to the court below, the Supreme Court of Arizona embraced a far better approach when it declared, "we should encourage resolution of constitutional arguments in court rather than on the streets." *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346, 350, 687 P.2d 354, 358 (1984). The role of lawyers in confrontations with the police should be to encourage peaceful, nonviolent resolution of difficulties giving deference for safety and the rule of law. Requiring lawyers to exhibit defiant bravado lest the client's acquiescence be construed as free and voluntary consent to search is grossly inappropriate.

It seems self-evident that our judicial system must prefer a philosophy where lawyers are encouraged to defuse volatile situations—even to the point of deferring to illegal demands made by police officers. It is silent testimony to the good sense of the vast majority of police officers and other officials that there are only scant references in the published decisions to the desirability and need for this rule of law.

The few cases which discuss the preference for courtroom resolutions over physical confrontations arise in a great variety of circumstances, most quite different from the issue of the voluntariness of a consent under the Fourth Amendment. But this is a time that the

context matters little. Our nation's jurisprudence strongly and necessarily embraces the courtroom rather than the street as the preferred venue for dispute resolution. Regardless of the context, the judicial statements embracing this preference are applicable here.

The District of Columbia Circuit recognized the broad judicial policy of "encourag[ing] those with actual and significant disagreements to seek their resolution in a civil, nonviolent setting. . . ." *Greenburg v. De Tessieres*, 902 F.2d 1002, 1004 (D.C. Cir. 1990); See also *Missouri v. Blair*, 638 S.W.2d 739, 760 (Mo. 1982). ("A free and peaceful society is directly dependent on a justice system where disputes between the state and a person or between two people are resolved in courts under rules of law and not by violence in the streets.") Perhaps the most apt comment comes from the Supreme Court of Oregon which said:

> Among the most important components of support for the law are nonviolent resolution of disputes and respect for those who enforce the law. More specifically, Oregon law is clear that any dispute over the legality of police action must be settled in court and not by resort to violence.

In re White, 311 Or. 573, 590, 815 P.2d 1257, 1265-66 (1991).

Attorney David Gordon gave advice in concert with this strong American tradition and critical

preference for the rule of law rather than a test of wills between police and citizens. His client should not suffer any diminishment of her rights because she followed his sound advice to comply with the law officers even though they made illegal threats.

A lawyer's counsel to yield to an improper police threat so that the matter may be resolved later in a court must never be counted as a factor which cleanses the threat of its coercion. Common sense suggests that permitting such attenuation puts citizens and police officers at great physical risk. This Court's search and seizure jurisprudence has often taken police safety into account in defining the precise application of the Fourth Amendment. This has been especially true in the line of cases involving the application of the "knock and announce" rule of common law to the Fourth Amendment. See, e.g., *Richards v. Wisconsin*, 520 U.S. 385 (1997); *Wilson v. Arkansas*, 514 U.S. 927 (1995).

Consideration of safety for both the police and the public strongly suggests that the Sixth Circuit was wrong. Citizens must not be told that their Fourth Amendment rights are dependent on their willingness to engage in games of "chicken" with police officers who make extra-legal threats to gain consent. Some police officers may well read a citizen's defiance of a threat as a signal to escalate their actions to an armed conflict. Some citizens may read the decision of the Sixth Circuit as not only endorsing, but requiring, a dangerous path of physical resistance.

The public interest strongly favors a reversal of the decision below. Little imagination is necessary to foresee deadly confrontations. It is equally clear that the rule of law will also be greatly endangered if the decision of the Sixth Circuit is allowed to stand.

C. THIS COURT SHOULD RESOLVE A SPLIT IN THE CIRCUITS CONCERNING THE DETERMINATIVE NATURE OF A LAWYER'S ADVICE TO ALLOW ENTRY ON THE ISSUE OF VOLUNTARINESS OF CONSENT.

This Court has never considered the role of an attorney's advice in determining the voluntariness of a consent to search. The Third Circuit has decided one case which reaches the opposite result from that of the Sixth Circuit in the case at bar.

The Third Circuit rejected the government's contention that an accused's college education, his business experience, and his consultation with an attorney prior to consenting to a search established an atmosphere of voluntariness. *United States v. Molt*, 589 F.2d 1247 (3rd Cir. 1978). The court agreed that "[the defendant's] representation to the attorney that he had nothing to hide, the attorney's opportunity to read the statute, and the attorney's advice to [the defendant] that he permit the inspection weigh in favor of the government's position." 589 F.2d at 1252. Nevertheless, the court held that voluntariness was a question of fact to be determined from all of the circumstances and that finding the defendant's consent was voluntary "would be tantamount to holding that, as a matter of law, consent

based on an attorney's advice must be voluntary." *Id.* The court was not willing to make such a holding.

In reaching its decision, the Third Circuit noted that the agent asserted that he was authorized to conduct the examination without a warrant. *Id.* at 1249. This is parallel to the erroneous claim of legal authority made by the St. Johns police officers ("we don't need a warrant because we're with the social worker.") But in *Molt*, unlike the case at bar, the attorney did not overhear, nor was he aware of, any threats to his client in the event consent was refused. Yet the *Molt* court affirmed the district court's holding that the customs agents' misrepresentation of authority to search invalidated the defendant's consent.

An even closer case is found in a district court decision from Minnesota where an attorney's proffered testimony was that while receiving a phone call from his client's son, he heard the officers say that they were going to search no matter what the attorney said. *Huotari v. Vanderport*, 380 F. Supp. 645, 648 (D. Minn. 1974). The court found that the attorney's advice to permit the officials entry did not render the consent voluntary.

Thus, with the contrary decision from the Third Circuit there is a split in the circuits on the effect of a lawyer's counsel in determining the voluntariness of consent. Consideration of public safety and preference for the rule of law outlined above strongly suggest that this Court should grant certiorari now even though only two circuits have spoken directly on the issue.

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted to review the decision of the Sixth Circuit.

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APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-1857

TIMOTHY D. SALTSMAN, TINA SALTSMAN, Individually and as Parents and Natural Guardians of ASHLEY SALTSMAN and TIMOTHY D. SALTSMAN, II,

Plaintiffs-Appellants,

v.

DAWN CAMPBELL, Individually; LARRY HENNING and SCOTT DEWITT, Individually; ST. JOHNS POLICE DEPARTMENT; MICHAEL MADDEN, Individually and in His Official Capacity as the Chief of Police of the St. Johns Police Department,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

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[stamp—FILED/MAY 12 1998/LEONARD GREEN, Clerk]

[stamp—NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced]

BEFORE: MARTIN, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges.

PER CURIAM. Plaintiffs-Appellants appeal the district court's grant of summary judgment for Defendants-Appellees in this civil rights action under 42 U.S.C. § 1983. Plaintiffs-Appellants' claims arise from an encounter between Plaintiff-Appellant Tina Saltsman and three local officials — two police officers and a social worker. The encounter ended with a search of the Saltsmans' home, which Plaintiffs-Appellants claim was unlawful because it was based on involuntary consent. After reviewing the circumstances of the search, we find that there was no violation of Plaintiffs-Appellants' Fourth Amendment rights, and we therefore AFFIRM the lower court's decision.

On March 21, 1996, an anonymous caller contacted the Clinton County, Michigan Department of Social Services, now known as the Family Independence Agency ("DSS"). The caller identified himself as the grandfather of Tim and Tina Saltsman's minor children, and complained that the Saltsmans' house was maintained in "deplorable condition" and that the children who were being home-schooled had not received lessons in a long time. At approximately 4 p.m. the next day, DSS social worker Dawn Campbell visited the Saltsman home to investigate the complaint.

When Mrs. Saltsman answered the door, Ms. Campbell identified herself as an employee of the DSS and asked if she could speak with Mrs. Saltsman regarding a complaint. Mrs. Saltsman stepped outside, closed the door behind her, and told Ms. Campbell that she could not enter the house. Ms. Campbell left to return to work and consult with her supervisor. According to Mrs. Saltsman, Ms. Campbell said as she left that she "would, more than likely, be back with the police."

At approximately 4:30 p.m., Ms. Campbell returned to the Saltsman home, where she met Officers Larry Henning

and Scott Dewitt of the St. Johns, Michigan Police Department. After one of the three knocked on the door, Mrs. Saltsman came to the door with a cordless phone. She was speaking with her attorney, David Gordon of the Home School Legal Defense Association, whom she had called after Ms. Campbell's first visit. Mrs. Saltsman immediately denied Ms. Campbell and the officers entry. She asked whether they had a warrant, and again refused them entry when they failed to produce one.

At some point, Mr. Gordon asked to speak with one of the officers, and then spoke with Officer Henning over the phone. After Mr. Gordon asserted that a search warrant was required to obtain entry, Officer Henning replied that they did not need one because they were with a social worker. He later testified that his behavior was consistent with his usual behavior in such situations. Mr. Gordon suggested that Ms. Campbell view the children outside, and Mrs. Saltsman brought the two oldest children out the back door. After observing them, Ms. Campbell stated that she still needed to enter the home. Mrs. Saltsman did not respond to this statement because she was talking to Mr. Gordon when it was made.

Mrs. Saltsman testified that Mr. Gordon spoke with one of the officers again, and that the officer then commented that they "would get in one way or another," and that if they were refused entry, they would take her children. Mr. Gordon testified that he heard similar comments. Officer Henning does not remember such comments being made, and Officer Dewitt testified that he may have told her not to worry about having her children taken away because that could happen only if they were in danger.

Mrs. Saltsman went back inside and closed the door. The officers and Ms. Campbell walked to the front of the house

to discuss their options. Ms. Campbell said she would consult again with her supervisor. Officer Dewitt and Ms. Campbell then began walking back to their cars.

Officer Henning remained near the house and knocked again. At that point, Mrs. Saltsman opened the door, threw up her hands, and said she would let them in. Mr. Gordon had told her to consent.

Once inside, Ms. Campbell performed a brief search of the home that lasted approximately five to seven minutes. She did not find any evidence to substantiate the complaint against the Saltsmans, and therefore closed the case on April 30, 1996.

On April 15, 1996, the Saltsmans filed a complaint under 42 U.S.C. § 1983 against Ms. Campbell, the DSS and its director, and the St. Johns Police Department, its chief, and Officers Henning and Dewitt. The Saltsmans filed the suit on behalf of themselves and their minor children who were at home on March 22. The Saltsmans sought equitable and monetary relief, alleging that Ms. Campbell and Officers Henning and Dewitt had violated their Fourth and Fourteenth Amendment rights during the search of their home, and that the police department violated their rights by maintaining an unconstitutional policy regarding child welfare searches.

On August 12, 1996, the district court dismissed the DSS and its director from the suit. All remaining parties filed cross-motions for summary judgment. The district court decided the motions in favor of Defendants on July 14, 1997, and the Saltsmans filed this timely appeal on August 6, 1997.

This Court reviews the district court's grant of summary judgment *de novo*. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). Summary judgment is

proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of demonstrating that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Viewing the evidence in the light most favorable to the nonmoving party, this Court must determine whether it is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Although the officers' initial actions and comments when they were at the Saltsmans' door may have been improper, the totality of the circumstances does not support a finding that the ensuing search was unlawful. Because Mrs. Saltsman's attorney participated in the encounter via telephone and told Mrs. Saltsman to allow the search, the district court was correct in determining that the search did not violate the Saltsmans' constitutional rights. Because the search was valid, Mrs. Saltsman could not prove that Ms. Campbell and the police officers violated the Saltsmans' constitutional rights in a way that demanded equitable relief or denied the officials qualified immunity.

To be valid, consent must be freely and voluntarily given within the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 227 (1973); *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir.), *cert. denied* 117 S. Ct. 136 (1996). Among the factors to consider are "... the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of the detention; and the use of coercive or punishing conduct by the police." *Riascos-Suarez*, 73 F.3d at 625 (citing *United States v. Jones*, 846 F.2d 358, 360 (6th Cir. 1988)).

In the case at hand, consent was given by an adult woman who had a clear understanding of her rights. She had been educated about the Fourth Amendment through a manual and other information sent to her by the Home School Legal Defense Association, and she asserted her rights repeatedly during her conversation with Ms. Campbell and the officers. The encounter lasted less than twenty minutes, during which time Mrs. Saltsman conferred constantly with her attorney.

The Saltsmans' claim of coercion revolves around the alleged statements by the officers that they would enter the home no matter what, and that Mrs. Saltsman's children could be taken away. Although Mrs. Saltsman testified that an officer did make such comments, the officers said they do not remember them, or remember them being made in much more neutral contexts. Regardless, even when the comments are considered in the light most favorable to the Saltsmans, they do not undermine the validity of Mrs. Saltsman's consent. Between the time when the comments were allegedly made and the consent given, Mrs. Saltsman conversed privately with her attorney from the inside of the home while the officers had moved away from the back door. During that conversation, the attorney advised Mrs. Saltsman to allow the search.[1]

Under the totality of the circumstances, Ms. Saltsman's consent was not a direct reaction to the officers' conduct. Rather, it was in response to advice received during the private telephone conversation she had with her attorney while Ms. Campbell and Officer Dewitt returned to their cars and Officer Henning was outside. Even when consider-

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[1] Although the fact that Mrs. Saltsman was conferring with her attorney is not dispositive, it is a factor that this court has considered before in determining the validity of an individual's consent. *United States v. Blackeney*, 942 F.2d 1001, 1016-17 (6th Cir. 1991).

ing the situation in "the light most favorable to [Plaintiffs]" as required by Fed. R. Civ. P. 56(c), the evidence supporting the validity of Mrs. Saltsman's consent is one-sided, and the district court was correct in deciding that Mrs. Saltsman freely gave her consent as a matter of law. *Anderson*, 477 U.S. at 251-52.

The Saltsmans claim that they are entitled to equitable relief because the warrantless search of their home violated the Fourth Amendment. A warrantless search of a home is generally unconstitutional. *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). However, the need for a warrant is eliminated when an individual with authority to do so voluntarily consents to a warrantless search. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). As a resident of the house, Mrs. Saltsman had authority to give such consent. *Blackeney*, 942 F.2d at 1015 (citing *Schneckloth*, 412 U.S. at 219). Because the consent was, as discussed above, voluntary and valid, it fit the exception to the warrant requirement, and was constitutional. As such, the Saltsmans fail to make a claim for equitable relief. Qualified immunity protects a state official from monetary damages awarded for claims arising from discretionary activity, so long as his actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Ms. Campbell and Officers Henning and Dewitt are entitled to qualified immunity in the case at hand unless the Saltsmans can prove that the search of their home was unconstitutional, and that its illegality was so apparent that a reasonable social worker or law enforcement officer would have recognized its defects. *See e.g., Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996) (explaining that the first step in determining

whether qualified immunity applies is to determine whether plaintiff showed a violation of his constitutional rights, and that the second step is to determine whether that violation was so obvious that a reasonable official would have recognized the violation). Because the search was consensual and therefore within the consent exception to the warrant requirement, the Saltsmans fail to show that the state officials' actions were unconstitutional. Thus Ms. Campbell and the police officers are entitled to qualified immunity, and summary judgment was appropriate.

A municipality may be liable under 42 U.S.C. § 1983 if action taken pursuant to an official municipal policy caused a constitutional tort. *Monell v. Department. of Social Servs.*, 436 U.S. 658 (1978). For *Monell* liability to attach, a plaintiff must "identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy." *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1993) (on appeal after remand per order of *Tennessee v. Garner*, 471 U.S. 1 (1985)). There must be a sufficient link between a municipality's policy and actions "to establish that the policy was the 'moving force of the constitutional violation.'" *Id.* at 365.

The Saltsmans base their claim of municipal liability on statements made by Officer Henning. Specifically, after Officer Henning admitted in his deposition that he told Mrs. Saltsman that a warrant was not necessary because the police officers were present with a social worker, his testimony continues

> Q: . . . Because you didn't have enough evidence or information to know whether there was an emergency condition inside the house or not?
>
> A. We -- we were told there was, but we did not have enough information.

Q. Okay. Would it be consistent with policy to say "We don't need a warrant because we're here with social workers" when you, the police, don't have enough information to know whether there is or not?

A. We don't have a policy on it.

Q. Is there a practice, what you routinely do?

. . . (objection)

A. Well, what is routinely done is, you try to gain enough information from the house to make that decision, either by looking through the windows or somehow finding out.

. . .

Q. When you said "We don't need a warrant because we're here with social workers," was that statement at that point in time under the totality of facts, was that consistent with department policy?

A. The department doesn't have a policy on it

Q. The department practice.

A. The practice would be to use the information from the social worker and try to gain more information yourself. That's the way I've done it.

Plaintiffs allege that Officer Henning stated in his testimony that he acted pursuant to an established police department policy. That is a mistaken interpretation. Officer Henning stated repeatedly that there was NO policy. Officer Henning was merely stating that he acted as he normally does in such situations -- when he is uncertain of whether there are exigent circumstances calling for a warrantless entry into a home, he continues to talk to the resident to discern more information.

The Saltsmans fail to show that Officer Henning's comments prove the existence of any established policy. Even if they did, they in no way indicate any unconstitutionality in such a policy. As such, the Saltsmans fail to provide any evidence necessary to meet the test for municipal liability. The district court therefore correctly granted summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 5:96-CV-63
Hon. Benjamin F. Gibson

TIMOTHY D. SALTSMAN, TINA SALTSMAN, individually and as parents and guardians of ASHLEY SALTSMAN and TIMOTHY D. SALTSMAN, II,

Plaintiffs,

v.

DAWN CAMPBELL, individually; ROGER SHUTES, individually and in his official capacity as Director of Clinton County Department of Social Services; CLINTON COUNTY DEPARTMENT OF SOCIAL SERVICES; LARRY HENNING and SCOTT DEWITT, individually; ST. JOHNS POLICE DEPARTMENT; MICHAEL MADDEN, individually and in his official capacity as the Chief of Police of the St. Johns Police Department,

Defendants.

[stamp—Certified as a true copy/Ronald C. Weston, St., Clerk/
By /s/ D. Corlew/Deputy Clerk/U.S. District Court/
Western Dist. of Michigan/Date 7/15/97]

JUDGMENT

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 11th day of July, 1997.

PRESENT: THE HONORABLE BENJAMIN F. GIBSON,
Senior United States District Judge

In accordance with the Court's Opinion of this date;

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment (pleading no. 47) is DENIED.

IT IS FURTHER ORDERED that defendant Campbell's motion for dismissal and summary judgment (pleading no. 52) is GRANTED IN PART and DENIED IN PART, as follows: defendant Campbell's motion for summary judgment on all of plaintiffs' claims against her is GRANTED; defendant Campbell's motion to dismiss Timothy Saltsman is DENIED as moot; defendant Campbell's request for costs and attorney fees is DENIED.

IT IS FURTHER ORDERED that defendants Henning, Dewitt, Madden, and the St. Johns Police Department's motion for summary judgment on all of plaintiffs' claims against them (pleading no. 51) is GRANTED.

IT IS FURTHER ORDERED that JUDGMENT is granted for defendants Campbell, Henning, Dewitt, Madden and the St. Johns Police Department's on all of plaintiffs' claims against them.

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
SENIOR U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 5:96-CV-63
Hon. Benjamin F. Gibson

TIMOTHY D. SALTSMAN, TINA SALTSMAN, individually and as parents and guardians of ASHLEY SALTSMAN and TIMOTHY D. SALTSMAN, II,

Plaintiffs,

v.

DAWN CAMPBELL, individually; ROGER SHUTES, individually and in his official capacity as Director of Clinton County Department of Social Services; CLINTON COUNTY DEPARTMENT OF SOCIAL SERVICES; LARRY HENNING and SCOTT DEWITT, individually; ST. JOHNS POLICE DEPARTMENT; MICHAEL MADDEN, individually and in his capacity as the Chief of Police of the St. Johns Police Department,

Defendants.

JUDGMENT

This is a civil rights action in which plaintiffs seek monetary damages and equitable relief against defendants for entering plaintiffs' home without a warrant to investigate a complaint of child neglect. Pending before the Court are the parties' cross-motions for summary judgment.[1] For the

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[1] Defendants Roger Shutes and the Clinton County Department of Social Services, now the Family Independence Agency, were dismissed by an Order of this Court dated August 12, 1996.

following reasons, plaintiffs' motion is denied, defendant Dawn Campbell'S motion is granted in part and denied in part, and defendants Larry Henning, Scott Dewitt, Michael Madden, and the St. Johns Police Department's motion is granted.

I.

Plaintiffs Timothy and Tina Saltsman are the parents of five children. The Saltsmans reside in St. Johns, Michigan. Defendant Dawn Campbell is a child protective services worker and is employed by the Clinton County Family Independence Agency ("FIA"). Defendants Larry Henning and Scott Dewitt are police officers employed by the St. Johns Police Department. Defendant Michael Madden is the Chief of Police for the St. Johns Police Department.

On March 21, 1996, the FIA received a complaint about the Saltsmans' home by a person claiming to be a grandparent of the Saltsmans' children. The anonymous person alleged that Tina Saltsman pulled her child out of school and was not educating the child at home. The complainant further alleged that the Saltsmans' home is in deplorable condition, is cluttered with food and junk, and smells of dirty clothes.

On March 22, 1996, Tina Saltsman was in her home with three of her children, Ashley, then seven years old, Timothy, then five years old, and Alene, then three weeks old. At approximately 4:00 p.m., Campbell visited the Saltsmans' home to investigate the complaint received the day before. Campbell knocked on the front door and Tina Saltsman answered. Campbell identified herself and explained that she was from the FIA and needed to talk to Saltsman about a complaint the FIA had received. Tina Saltsman responded by walking outside the home and closing the front door behind her. She told Campbell that she could not enter the home.

Campbell left the Saltsmans' residence and returned to her office. After consulting with her supervisor, Campbell contacted the central dispatch of the St. Johns Police Department and requested assistance with her investigation of the Saltsmans' home.

As soon as Campbell left her property, Saltsman called the Home School Legal Defense Association ("the Association"), located in Purcellville, Virginia. Saltsman had been a member of the Association for several years. As a dues paying member, Saltsman could call an Association attorney in Virginia to receive legal advice. On the day in question, the receptionist for the Association forwarded Saltsman's call to David Gordon, an Association attorney. Saltsman told Gordon that a child protective services worker came to her home and when entry was refused, said she would return with the police.

A few minutes later, at approximately 4:30 p.m., officers Henning and Dewitt met Campbell at the Saltsmans' residence. One of the three knocked on the Saltsmans' front door and requested entry. Through the closed door, Tina Saltsman told them that they could not come in. Saltsman then left the home through the back door and walked around to the front of the house carrying a portable telephone. Gordon was still on the line. Saltsman asked the officers if they had a warrant and was told that they did not. Campbell told Saltsman that she needed to come in to make sure the children were safe. Saltsman refused to allow them to enter her home.

At some point Gordon asked Saltsman to hand the telephone to one of the officers. Gordon informed the officer that the Fourth Amendment prohibited his entry into the Saltsmans' home without a warrant or exigent circumstances. The officer allegedly said "we don't need a warrant because we're with her," referring to Campbell.

Eventually, Gordon suggested that Saltsman bring the children to a door so that the officers and Campbell could see that the children were not in danger. Saltsman told Campbell to go to the rear of the house and she would bring the children to the back door for observation. Saltsman brought Ashley and Timothy to the back door. After viewing the children, Campbell stated that she still needed to enter to make sure the home was safe. Saltsman did not respond as she was conferring with Gordon on the telephone.

Saltsman testified that one of the officers then spoke to Gordon again. After the officer handed the telephone back to Saltsman, she alleges that the officer said that they "would get in one way or the other," and if she did not let them in, they would take her children. Saltsman then shut the back door and spoke with Gordon. The officers and Campbell walked around to the front of the house, and Campbell and Dewitt began to walk toward Campbell's car.

Henning knocked on the front door of the home and Saltsman came out, threw her hands up, and let Henning into the home. Henning informed Campbell and Dewitt that Saltsman was going to let them in. Campbell and Dewitt walked back toward the house and entered the front door.

Campbell and Saltsman walked through the house while the officers waited inside the front door. Campbell did not find the house in deplorable condition as was reported. On April 30, 1996, Campbell officially closed her investigation of the Saltsmans, finding insufficient evidence to substantiate the complaint.

Timothy and Tina Saltsman filed this civil rights action on behalf of themselves and their three children who were present on March 22, 1996. Plaintiffs ask for equitable relief and damages against defendants under Title 42 United States Code Section 1983 ("Section 1983"). Plaintiffs claim that Campbell, Henning, and Dewitt entered their home and

interrogated Tina Saltsman in violation of the Fourth Amendment and the Fourteenth Amendment liberty interest in family privacy and integrity. Plaintiffs further allege that the St. Johns Police Department ("Police Department") and Madden, in his official capacity, failed to properly train Henning and Dewitt, which resulted in their unconstitutional conduct, and maintained the unconstitutional policy of informing parents subject to an FIA investigation that the police do not need a warrant if they are with an FIA worker. Finally, plaintiffs sue Madden in his individual capacity, arguing that he tacitly or explicitly encouraged Henning and Dewitt's unconstitutional conduct.

II.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on files, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). In ruling on a motion for summary judgment, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

III.

On the same day, all parties filed motions for summary judgment. Plaintiffs move for summary judgment on their Fourth Amendment claims against Campbell, Henning, and Dewitt, arguing that no exigent circumstances existed and no valid consent to enter was given. Campbell, Henning, and Dewitt move for summary judgment claiming they are enti-

tled to qualified immunity or, in the alternative, for summary judgment because no genuine issue of fact regarding whether they violated the Saltsmans' Fourth Amendment rights exists due to Tina Saltsman's consent. Defendants Campbell, Henning, and Dewitt also move for summary judgment on plaintiffs' Fourteenth Amendment claims for damages and equitable relief, contending that the facts of this case do not establish a violation of plaintiffs' right to family privacy and integrity. In addition, plaintiffs move for summary judgment on their claim that the Police Department and Madden, in his official capacity, violated plaintiffs' constitutional rights by promulgating a policy which led to the violation of plaintiffs' constitutional rights. In turn, the Police Department and Madden, in his official capacity, move for summary judgment, arguing that plaintiffs cannot prove that a City policy or the City's failure to train its employees injured plaintiffs. Finally, Madden, in his individual capacity, moves for summary judgment, claiming that plaintiffs cannot prove that he encouraged the allegedly unconstitutional conduct or in some other way directly participated in it.

A.

Plaintiffs argue that they are entitled to summary judgment on their Fourth Amendment claims against Campbell, Henning, and Dewitt because defendants are not entitled to qualified immunity and because no justification exists for their entry into plaintiffs' home. Defendants Campbell, Henning, and Dewitt move for summary judgment, arguing that they are immune from plaintiffs' Fourth Amendment claims.

"Under the doctrine of qualified immunity, government officials are protected from being sued in their individual capacities for damages if their actions did not 'violate clearly established statutory or constitutional rights of which a

reasonable person would have known.'" *Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The Sixth Circuit has explained that "qualified immunity protects officials only from a suit for monetary damages." *Cagle v. Gilley*, 957 F.2d 1347, 1350 (6th Cir. 1992). Accordingly, the Court will only consider summary judgment on plaintiffs' claims for monetary damages in this portion of the Opinion.

The Sixth Circuit has explained that "[w]hen analyzing a qualified immunity issue, the first step is to determine whether plaintiff has shown a violation of a constitutionally protected right." *Brennan v. Township of Northville*, 78 F.3d 1152, 1154 (6th Cir. 1996) (citing *Megenity v. Stenger*, 27 F.3d 1120, 1124 (6th Cir. 1994)). "If the answer is yes, then the second step is to determine whether the right is so 'clearly established' that a 'reasonable official would understand that what he is doing violated that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Turning to the first step, the Court must determine whether plaintiffs have shown a violation of a constitutionally protected right. *Brennan*, 78 F.3d at 1154. It is well settled that because of the reasonable expectation of privacy normally associated with it, the home "is accorded the full range of Fourth Amendment protections." *Payton v. New York*, 445 U.S. 573, 576 (1980); *Lewis v. United States*, 385 U.S. 206, 211 (1966). As such, a police officer must usually obtain a warrant to enter the home in order to conduct a search. *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984). However, a warrant is not required if probable cause and exigent circumstances exist, *Warden v. Hayden*, 387 U.S. 294 (1967); if the officers are in "hot pursuit" of a criminal suspect, *United States v. Santana*, 427 U.S. 38 (1976); or if a person with authority consents to the officers' entry, *Payton*, 445 U.S. at 57.

In this case, plaintiffs claim that no exigent circumstances existed and that Tina Saltsman's consent was coerced and was therefore invalid. Plaintiffs point to Saltsman's testimony that she only consented because an officer threatened to take her children if she did not consent. Plaintiffs argue further that Henning admitted that he made the statement that he did not need a warrant because he was with Campbell, and Dewitt admitted that he told Saltsman that they would "get in one way or the other." Plaintiffs contend that such statements contributed to the coercion of Saltsman's consent.

In contrast, Campbell, Henning, and Dewitt point out that Saltsman was on the telephone with her attorney the entire time that they were on her property and that she testified that she decided to consent on the advice of her attorney. Therefore, defendants argue that plaintiff was well informed of her rights and decided to waive her rights by validly consenting to entry into her home.

Consent to search is valid if it is freely and voluntarily given. *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996). A court determines whether consent is free and voluntary by examining the totality of the circumstances. *Id.* "Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police." *Id.*

Considering the totality of the circumstances, the Court finds that Tina Saltsman validly consented to a search of her home. First, the Court finds that Saltsman was educated in the area of Fourth Amendment law due to her involvement with the Home School Legal Defense Association. Saltsman

refused entry a number of times because Campbell, Henning, and Dewitt did not have a warrant; therefore, it is clear that she understood her constitutional right to refuse entry. Moreover, Saltsman was on the telephone to an attorney obtaining legal advice the entire time that Campbell, Henning, and Dewitt were on her property.

Plaintiffs claim, however, that the officers used coercive or punishing conduct to induce Tina Saltsman's consent. First, plaintiffs point to Henning's and Dewitt's admissions. The Court finds that Henning's statement to Gordon that he did not need a warrant because he was with Campbell did not coerce Saltsman to consent to entry. Saltsman knew that a warrant was required for entry and, in fact, she admits that even after Henning made the statement to Gordon, she continued to refuse entry. Therefore, Henning's statement did not coerce Saltsman's consent.

Turning to Dewitt's statement, he admitted that he told Saltsman that he would get in one way or the other. Saltsman claims that this statement was made in conjunction with a threat to take her children if she did not consent to entry. Therefore, the Court will address these statements together. Assuming that such statements were made, the Court finds that under the circumstances of this case, the statements do not rise to the level of coercion, negating Saltsman's valid consent.

According to Saltsman, she was standing inside the back door of her home when the alleged coercive statements were made and Henning, Dewitt, and Campbell were standing outside. She then closed her door and conferred with her attorney while Henning, Dewitt, and Campbell began to walk toward the front of the house. Saltsman then walked to the front door and let Henning into her home. Accordingly, Saltsman's consent was not contemporaneous with the alleged coercive statements. In other words, she did not, as

plaintiffs contend, cave under the threat of losing her children. Instead, she closed the door and privately consulted with her attorney about whether she should consent to entry. Saltsman and Gordon both testified that Gordon advised Saltsman to consent.

The Court further finds that there was no immediate threat to Saltsman's children. Neither the officers nor Campbell were pounding on Saltsman's door demanding entry after allegedly threatening her. In fact, plaintiff acknowledges that after the alleged statements were made, the officers and Campbell left the back door and began walking toward the front of the house. Furthermore, Saltsman testified that neither the officers nor Campbell ever spoke to her in a loud or disrespectful manner, tried to get into her home, or even demanded entry. Saltsman was fully aware of her legal rights and if she feared that the officers and Campbell would take her children after they returned with a warrant, she had the time and the knowledge to secure legal representation to protect her children before their return.

Finally, the Court finds irrelevant the fact that Henning knocked on Saltsman's door immediately prior to her consent. It is undisputed that Dewitt and Campbell were walking away from the house, Henning went to the front door alone and knocked, Saltsman opened the door and without waiting for Henning to speak, invited him into her home. Moreover, Saltsman testified that the decision to consent had already been made before she answered the door. The Court concludes that the totality of the circumstances of this case simply do not, as a matter of law, establish that Saltsman's consent was coerced.

The Court finds that plaintiffs cannot show a violation of a constitutionally protected right. Accordingly, Henning, Dewitt, and Campbell are entitled to qualified immunity on plaintiffs' Fourth Amendment claims. *Brennan*, 78 F.3d at

1154. The Court will grant Henning, Campbell and Dewitt's motions for summary judgment on plaintiffs' claims under the Fourth Amendment for monetary damages.

B.

Defendants Campbell, Henning, and Dewitt also move for summary judgment on plaintiffs' Fourth Amendment claims for equitable relief based upon their position that no genuine issue of material fact exists concerning whether Tina Saltsman consented to their entry and search of her home. Since the Court found that Tina Saltsman consented to Campbell, Henning, and Dewitt's entry and search of her home, the Court will grant their motion for summary judgment on plaintiffs' request for equitable relief.

C.

Defendants Campbell, Henning, and Dewitt move for summary judgment on plaintiffs' claim for damages and equitable relief due to defendants' alleged violation of plaintiffs' Fourteenth Amendment right to family privacy and integrity. Defendants argue that they are entitled to summary judgment on this claim because the facts of this case do not give rise to a Fourteenth Amendment claim that defendants violated plaintiffs' right to family privacy and integrity when they entered plaintiffs' home without a warrant and when Campbell allegedly interrogated Tina Saltsman about her children's education.

" 'It is well established that there is a broadly defined liberty interest in preserving the integrity and stability of the family from intervention by the state without due process of law.' " *Hubbard v. City of Middletown*, 782 F. Supp. 1573, 1580 (S.D. Ohio 1990) (quoting *Green v. City of New York*, 675 F. Supp. 110, 113 (S.D.N.Y 1987)); *see also Moore v. City of Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410

U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Courts have recognized a Section 1983 cause of action "where the state has deprived a parent, child or spouse of the right of the family to remain together." *Id.*; *see Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987) (holding that the children of a deceased pretrial detainee may maintain a Section 1983 action); *Duchesne v. Sugarman*, 566 F.2d 817 (2nd Cir. 1977) (finding that a mother has a Section 1983 claim for seizure of her children by social services employee without a hearing or a court order). The *Hubbard* court emphasized that "those cases finding a constitutional deprivation under the Fourteenth Amendment concerned only the situation where a family member has been completely removed from the family unit due to state action." *Id.*; *see also Pittsley v. Warish*, 927 F.2d 3 (1st Cir.), *cert. denied*, 502 U.S. 879 (1991) (finding that plaintiff must allege permanent, physical loss of association of an immediate family member to maintain a Section 1983 action under the Fourteenth Amendment).

In this case, it is undisputed by the parties that the Saltsmans' children were not removed from their home. Therefore, under the facts of this case, plaintiffs cannot maintain an action for violation of their right to family privacy and integrity. Defendants are entitled to summary judgment on plaintiffs' Fourteenth Amendment claims.

D.

Plaintiffs move for summary judgment on their claim that the Police Department and Madden, in his official capacity, violated plaintiffs' constitutional rights by promulgating a policy of telling parents subject to an FIA investigation that a warrant is not needed if the police are with an FIA worker. The Police Department and Madden, in his official capacity, move for summary judgment on all of plaintiffs' claims against them.

A suit against an agency of a municipality and a supervisor in his or her official capacity is a suit against the municipality, in this case the City of St. Johns, Michigan ("City"). *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Municipal liability exists with regard to a Section 1983 claim only for the constitutional violations caused by the municipality; accordingly, the theories of *respondeat superior* and vicarious liability "will not attach under Section 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

The Court turns first to plaintiffs' claim that a municipal policy caused the officers' unconstitutional conduct. Municipal liability is limited to those situations in which a municipal policy is the "moving force [behind] the constitutional violation." *Monell*, 436 U.S. at 694. To establish municipal liability, plaintiffs must show (1) the existence of a municipal policy or custom and (2) that there is a direct causal link between the policy or custom and the injury alleged. *City of Canton*, 489 U.S. at 385.

Plaintiffs contend that the Police Department has an official policy which directs officers to tell people subject to an FIA investigation that police officers do not need a warrant if they are with an FIA worker. The City argues that plaintiffs have failed to present any evidence that such a policy exists.

In support of their motion and in defense of the defendants' motion, plaintiffs offer the testimony of Henning and Madden. Plaintiffs claim that Henning admitted that he told Tina Saltsman that he could enter her home without a warrant because he was with Campbell and testified that such a statement was the practice of the Police Department. The Court has reviewed Henning's testimony and finds that plaintiffs' interpretation of Henning's testimony is inaccu-

rate. Henning clearly explained that the policy of the Police Department is that officers may not enter a home without a warrant unless exigent circumstances or some other circumstance constituting an exception to the warrant requirement exists.

Plaintiffs also point to Madden's testimony to support their theory. Plaintiffs contend that Madden testified that the statement at issue is not necessarily inconsistent with Police Department policy. Again, plaintiffs misconstrue the testimony. Madden explained that if Henning made such a statement it would not be consistent with Police Department policy unless the officer meant that if consent is given to the FIA worker, entry by the officers would be legal as well because they are assisting the FIA worker. In other words, Madden testified that it is not the policy of the Police Department for officers to enter homes without consent as long as they are with an FIA worker. Plaintiffs provide no further evidence in support of their claim against the City.

The Court finds that even if Henning told Saltsman that he could enter without a warrant because he was with Campbell, plaintiffs have failed to establish that such a statement constitutes a policy of the City. Accordingly, the Court denies plaintiffs' motion for summary judgment on their claim that the Police Department's policy violated their constitutional rights. *City of Canton*, 489 U.S. at 385. Instead, the Court grants summary judgment in favor of the Police Department and Madden, in his official capacity, on plaintiffs' claim concerning an unconstitutional City policy.

Defendants also move for summary judgment on plaintiffs' claim that the Police Department and Madden, in his official capacity, failed to train Henning and Dewitt, causing hem to violate plaintiffs' rights. A city can be liable under Section 1983 for failure to train its employees. *Id.* at 388. However, "[o]nly where a municipality's failure to train its

employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under Section 1983." *Id.* at 389. The Supreme Court explained that the failure to train must reflect a deliberate or conscious choice by the municipality. *Id.* The need for more or different training must be "so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390. Furthermore, "for liability to attach . . . , the identified deficiency in the city's training program must be closely related to the ultimate injury." *Id.* at 391; *Jones v. City of Carlisle*, 3 F.3d 945, 950 (6th Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994).

In support of their motion, defendants provide evidence that new officers with the St. John's Police Department are given a Field Training Manual which outlines Fourth Amendment search and seizure law. Furthermore, the testimony of Henning and Dewitt illustrates that they have been trained on and are knowledgeable about Fourth Amendment law. The Field Training Manual also indicates that officers are trained on the procedure for assisting in a child abuse or neglect investigation. Based on this evidence, defendants argue that plaintiffs cannot show that the city failed to train its police officers or that even if the City failed to train its officers, such failure was a result of deliberate indifference. Accordingly, defendants contend that no genuine issues of fact exist concerning plaintiffs' failure to train allegation, entitling the Police Department and Madden, in his official capacity, to summary judgment.

Once a moving party has properly supported a motion for summary judgment, "an adverse party may not rest upon mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as other-

wise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial.'' Fed. R. Civ. P. 56(e). The Sixth Circuit emphasized this point by explaining that the responding party must '' 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' '' *Street*, 886 F.2d at 1479 (quoting *Anderson*, 477 U.S. at 256).

The Court finds that defendants have established that no genuine issue of fact exists concerning whether the City failed to train its police officers on Fourth Amendment search and seizure law. Plaintiffs do not offer any argument, let alone evidence, to defeat defendants' properly supported motion. Therefore, the Court grants defendants' motion for summary judgment on plaintiffs' Fourth Amendment claims against the Police Department and Madden in his official capacity.

E.

Madden moves for summary judgment on the claims made against him in his individual capacity. ''A supervisory employee cannot be held liable under Section 1983 for the constitutional torts of those he supervises unless it is shown 'that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it.' '' *Searcy v. City of Dayton*, 38 F.3d 282, 287 (6th Cir. 1994) (quoting *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.), *cert. denied*, 469 U.S. 845 (1984)). In other words, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending employees. *Walton v. City of Southfield*, 995 F.2d 1331, 1340 (6th Cir. 1993); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (6th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *see also Knop v. Johnson*, 977 F.2d 996, 1014 (6th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993).

Madden argues that even assuming that Henning and Dewitt's conduct was unconstitutional, plaintiffs cannot produce any evidence which would show that he implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct. *Walton*, 995 F.2d at 1340. The Court finds that Madden's motion is well supported. Plaintiffs have failed to submit any argument or evidence in support of these claims against Madden. The Court will grant Madden's motion for summary judgment on plaintiffs' claims against him in his individual capacity.

IV.

Since the Court grants summary judgment for Campbell on all of plaintiff's claims against her, Campbell's motion to dismiss Timothy Saltsman for lack of standing is denied as moot. Furthermore, the Court finds that Campbell has not demonstrated that awarding costs and attorney fees would be appropriate in this case. Therefore, Campbell's request for costs and attorney fees is denied.

V.

For the foregoing reasons, the Court will deny plaintiffs' motion for summary judgment on their Fourth Amendment claims against Campbell, Henning, and Dewitt and their claims against the Police Department and Madden in his official capacity. The Court grants Campbell, Henning, Dewitt, Madden, and the Police Department's motions for summary judgment on all claims against them. However, the Court denies as moot Campbell's motion to dismiss Timothy Saltsman and denies her motion for costs and attorney fees. An appropriate order shall be entered.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
SENIOR U.S. DISTRICT JUDGE

DATED: July 11, 1997

(2)

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U.S.

No. 98-256

In The

Supreme Court of the United States

October Term, 1997

TIMOTHY D. SALTSMAN, *et al.*,

Petitioners,

vs.

DAWN CAMPBELL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS HENNING, DeWITT, ST. JOHNS POLICE DEPARTMENT AND MADDEN

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24 pp

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

I.

Do the totality of circumstances demonstrate valid consent where an adult woman educated in her rights under the Fourth Amendment repeatedly asserts them in response to a statement that a social worker and two police officers will get in one way or another, closes the door and consults by telephone with her attorney, but then opens the door and invites them in to complete an investigation regarding the condition of the home and care of the minor children?

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Michigan in *Saltsman v. Campbell*, File No 5:96-CV-63, was entered on July 11, 1997 and is reproduced at Appendix 13a to the petition for certiorari. It is unpublished.

The decision of the Sixth Circuit Court of Appeals in *Saltsman v. Campbell,* Case No. 97-1857 was filed on May 12, 1998. It is unpublished but can be found at 145 F.3d 1333, 1998 WL 252758 (6th Cir. (Mich.)). It is reproduced at Appendix la of to the petition for certiorari.

CONCISE STATEMENT OF THE CASE

A. The procedural history.

The Saltsmans complain that a child protective services worker and two police officers allegedly entered their residence in violation of the Fourth Amendment while investigating a complaint of child neglect and unsanitary conditions in the home (R. 1: Complaint, ¶¶ 11-28, 04/15/96, Apx. at pp. 13-16).

Defendants Larry Henning, Scott DeWitt, Michael Madden, and the St. Johns Police Department sought summary judgment (R. 51: Motion by Defendants, 03/03/97, Apx. at p. 169).[1] Defendant Dawn Campbell sought dismissal and summary judgment (R. 52: Motion by Defendant Campbell, 03/03/97, Apx. at p. 272).

The district court granted summary judgment in favor of Campbell, Henning, and DeWitt (R. 64: Opinion, pp. 12-13,

1. Michael Madden and the St. Johns Police Department were sued for allegedly creating an unconstitutional policy, an issue abandoned in the petition filed with this Court.

Apx. at p. 603-615). This ruling was based on the district court's conclusion that plaintiffs failed to show a violation of a constitutionally protected right because the totality of circumstances failed to establish that Mrs. Saltsman's consent was coerced (R. 64: Opinion, p 12, 07/14/97, Apx. at p. 614).

The district court found that Tina Saltsman was "educated in the area of Fourth Amendment law" and that she "understood her constitutional right to refuse entry" (R. 64: Opinion, p. 10, Apx. at p. 612). The district court evaluated Mrs. Saltsman's testimony that she consented because an officer threatened to take her children if she did not (R. 64: Opinion, p. 9, Apx. at p. 611). The district court also considered Mrs. Saltsman's claim that one officer told her he did not need a warrant because he was with the protective services worker and that the other officer told her that they would "get in one way or another" (R. 64: Opinion, p. 9, Apx. at p. 611). The district court rejected the contention that Mrs. Saltsman was coerced because even after the statements were made she continued to refuse entry (R. 64: Opinion, pp. 10-11, Apx. at p. 612-613). Mrs. Saltsman did not "cave under the threat of losing her children" (R. 64: Opinion, p. 11, Apx. at p. 613).

The district court took note of Mrs. Saltsman's testimony that "neither the officers nor Campbell ever spoke to her in a loud or disrespectful manner, tried to get into her home, or even demanded entry" (R. 64: Opinion, p. 12, Apx. at p. 614). Her consent was not "contemporaneous with the alleged coercive statements" (R. 64: Opinion, p. 11, Apx. at p. 613). It took place after she "closed the door and privately consulted with her attorney . . ." (R. 64: Opinion, p. 11, Apx. at p. 613). Accordingly, the district court held that plaintiffs failed to show the violation of a constitutionally protected right (R. 64: Opinion, p. 12, Apx. at p. 614). Judgment was entered in accord with the district court's opinion and order (R. 65: Judgment, 07/14/97, Apx. at p. 624).

The Sixth Circuit Court of Appeals affirmed the district court judgment (Opinion, 05/12/98, Apx. Petition, pp. 1a-10a). In a narrow, fact-based ruling, the Sixth Circuit Court of Appeals found no violation of the Saltmans' Fourth Amendment rights. The Sixth Circuit set forth the facts as follows:

> Plaintiffs Timothy and Tina Saltsman are the parents of five children. The Saltsmans reside in St. Johns, Michigan. Defendant Dawn Campbell is a child protective services worker and is employed by the Clinton County Family Independence Agency ("FIA"). Defendants Larry Henning and Scott Dewitt are police officers employed by the St. Johns Police Department. Defendant Michael Madden is the Chief of Police for the St. Johns Police Department.
>
> On March 21, 1996, the FIA received a complaint about the Saltsmans' home by a person claiming to be a grandparent of the Saltsmans' children. The anonymous person alleged that Tina Saltsman pulled her child out of school and was not educating the child at home. The complainant further alleged that the Saltsmans' home is in deplorable condition, is cluttered with food and junk, and smells of dirty clothes.
>
> On March 22, 1996, Tina Saltsman was in her home with three of her children, Ashley, then seven years old, Timothy, then five years old, and Alene, then three weeks old. At approximately 4:00 p.m., Campbell visited the Saltsmans' home to investigate the complaint received the day before. Campbell knocked on the front door and Tina Saltsman answered. Campbell identified herself and explained

that she was from the FIA and needed to talk to Saltsman about a complaint the FIA had received. Tina Saltsman responded by walking outside the home and closing the front door behind her. She told Campbell that she could not enter the home.

Campbell left the Saltsmans' residence and returned to her office. After consulting with her supervisor, Campbell contacted the central dispatch of the St. Johns Police Department and requested assistance with her investigation of the Saltsmans' home.

As soon as Campbell left her property, Saltsman called the Home School Legal Defense Association ("the Association"), located in Purcellville, Virginia. Saltsman had been a member of the Association for several years. As a dues paying member, Saltsman could call an Association attorney in Virginia to receive legal advice. On the day in question, the receptionist for the Association forwarded Saltsman's call to David Gordon, an Association attorney. Saltsman told Gordon that a child protective services worker came to her home and when entry was refused, said she would return with the police.

A few minutes later, at approximately 4:30 p.m., officers Henning and Dewitt met Campbell at the Saltsmans' residence. One of the three knocked on the Saltsmans' front door and requested entry. Through the closed door, Tina Saltsman told them that they could not come in. Saltsman then left the home through the back door and walked around to the front of the housing carrying a portable telephone. Gordon was still on the line. Saltsman

asked the officers if they had a warrant and was told that they did not. Campbell told Saltsman that she needed to come in to make sure the children were safe. Saltsman refused to allow them to enter her home.

At some point Gordon asked Saltsman to hand the telephone to one of the officers. Gordon informed the officer that the Fourth Amendment prohibited his entry into the Saltsmans' home without a warrant or exigent circumstances. The officer allegedly said "we don't need a warrant because we're with her," referring to Campbell.

Eventually, Gordon suggested that Saltsman bring the children to a door so that the officers and Campbell could see that the children were not in danger. Saltsman told Campbell to go to the rear of the house and she would bring the children to the back door for observation. Saltsman brought Ashley and Timothy to the back door. After viewing the children, Campbell stated that she still needed to enter to make sure the home was safe. Saltsman did not respond as she was conferring with Gordon on the telephone.

Saltsman testified that one of the officers then spoke to Gordon again. After the officer handed the telephone back to Saltsman, she alleges that the officer said that they "would get in one way or the other," and if she did not let them in, they would take her children. Saltsman then shut the back door and spoke with Gordon. The officers and Campbell walked around to the front of the house, and Campbell and Dewitt began to walk toward Campbell's car.

> Henning knocked on the front door of the home and Saltsman came out, threw her hands up, and let Henning into the home. Henning informed Campbell and Dewitt that Saltsman was going to let them in. Campbell and Dewitt walked back toward the house and entered the front door.
>
> Campbell and Saltsman walked through the house while the officers waited inside the front door. Campbell did not find the house in deplorable condition as was reported. On April 30, 1996, Campbell officially closed her investigation of the Saltsmans, finding insufficient evidence to substantiate the complaint. (Opinion, Apx. of Petition, pp. 14a-16a).

The Sixth Circuit applied this Court's test for a valid consent to these facts, asking if consent was "freely and voluntarily given within the totality of the circumstances" (Opinion, Apx. to Petition, p. 5a). Among the factors, the court considered were

> . . . the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of the detention; and the use of coercive or punishing conduct by the police.

(Opinion, Apx. of Petition, p. 5a quoting *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir.), *cert. denied*, 117 S. Ct. 136, 136 L. Ed. 2d 84, 65 USLW 3259 (1996)). The Sixth Circuit concluded that Mrs. Saltsman's consent was valid and affirmed the district court's ruling that she freely gave her consent as a matter of law (Opinion, Apx. of Petition, pp. 6a-7a). The Sixth Circuit also held that the individual defendants

are entitled to qualified immunity (Opinion, Apx. of Petition, pp. 7a-8a).

The Saltsmans now seek a writ of certiorari from this Court on the question of the voluntariness of consent.

B. The totality of circumstances relating to Tina Saltsman's consent.

On March 22, 1996, Dawn Campbell of the Clinton County Social Services visited the Saltsmans' home to investigate a complaint of child neglect and poor living conditions (R. 49: Statement of Undisputed Facts, Campbell Dep., pp. 24-25, Apx. at p. 91-92). When she arrived, Campbell told Tina Saltsman the purpose of her visit. (R. 49: Statement of Undisputed Facts, Campbell dep., p. 27, Apx. at p. 93). Tina Saltsman came out of the house and shut the front door behind her to talk to Campbell, but refused to let her into the house (R. 49: Statement of Undisputed Facts, Campbell dep, pp. 25, 27-28, Apx. at p. 93). Campbell's concern for the children was heightened by her observation of dirty diapers on the front porch and by Saltsman's actions and demeanor (R. 49: Statement of Undisputed Facts, Campbell dep. p. 24, 25, 27, 28, Apx. at pp. 93-95). In the house with Tina Saltsman were her three children Ashley, Timothy, and Alene, and two other children for whom Saltsman was caring (R. 49: Statement of Undisputed Facts, Saltsman dep., pp. 24-25, Apx. at p. 93).

When she was unable to gain admittance, Campbell left, contacted her supervisor, and then called the police department for assistance with a child welfare check (R. 49: Statement of Undisputed Fact, Campbell dep., pp. 28-29, Apx. at pp. 94-95). Before Campbell returned, Tina Saltsman had locked the doors, closed the blinds, and called her attorney, David Gordon.

The telephone call, which lasted 30 minutes, continued throughout the events (R. 51: Motion by Defendants, Gordon dep., pp. 5-14, Apx. at pp. 252-258).

David Gordon is an attorney licensed in Tennessee, Virginia and the District of Columbia (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., pp. 3-4, Apx. at pp. 250-251). An attorney-client relationship exists between Gordon's employer, the Home School Legal Defense Association, for which he is a staff attorney, and Ms. Saltsman (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., p. 4, Apx. at p. 251). Saltsman called Gordon for legal advice regarding the events transpiring at her home. (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., p. 5, Apx. at p. 252). She was on the telephone with Gordon when Campbell returned (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 49, 67, Apx. at pp. 212, 217).

Officers Henning and DeWitt met Campbell at the Saltsman residence. Campbell told them that the nature of the complaint was the condition of the home (R. 49: Statement of Undisputed Facts, Campbell Dep., p. 35, Apx. at p. 97). When Campbell and the officers asked to enter the house, Tina Saltsman came out, closed the door behind her, and again refused access (R. 49: Statement of Undisputed Facts, Campbell dep. p. 28-30, Apx. at pp. 94-96). Henning, DeWitt, and Campbell tried to persuade Saltsman to consent to entry (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 6-7, Apx. at pp. 224-225).

On the advice of her attorney, Saltsman brought one of the children to the back door so that Campbell could see her (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 49-53, 67, Apx. at pp. 212-216). The oldest Saltsman child appeared at the back door in a coat with the hood up (R. 51: Motion by

Defendants, Exhibit 4, DeWitt Dep., p. 7, Apx. at p. 238). Tina Saltsman told her daughter to say "she was okay, and her daughter did" (R. 52: Motion by Campbell, Exhibit 21, DeWitt dep., p. 7, Apx. at p. 350). Campbell again said she needed to inspect the home (R. 49: Statement of Undisputed Facts, Campbell dep. p. 46, Apx. at p. 100).

At this point, Campbell and the officers left the porch. But they continued to converse with Tina Saltsman, who continued talking with them and with her attorney over a portable telephone (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 51, Apx. at p. 214).

Tina Saltsman admitted that no physical threats were used and no physical movements of any kind took place that she perceived as physically threatening (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 72-73, Apx. at pp. 218-219). No one shouted. Saltsman was calm, neither yelling nor crying (R. 57: Memorandum Response by Campbell, Exhibit C, Saltsman dep., pp. 52-55, Apx. at pp. 545-548). Henning recalls saying that he did not have a warrant but one was not needed (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 16-17, Apx. at pp. 228-229). Henning did not have enough information from the protective service worker to know whether there was an emergency situation inside the house. He did not recall making other statements as alleged by plaintiffs (R. 51: Motion by Defendants, Exhibit 3, Henning dep. p. 15-17, 25-28, Apx. at pp. 227-229, 231-234).

Mrs. Saltsman claims that she was frightened by a threat that Campbell and the officers would get in one way or the other and that her children would be taken (R. 51: Motion by Defendants, Exhibit 2, Saltsman dep. p. 76, Apx. at p. 220). She understood the statement that they would get in one way or another to mean that if they didn't get in, they would have to

get a court order (R. 57: Memorandum Response by Campbell, Exhibit C, Saltsman dep., p. 76, Apx. at p. 555).

Saltsman, nevertheless, closed the door to the back porch and went inside to talk with her attorney on the telephone (R. 57: Memorandum Response by Campbell, Exhibit C, Saltsman dep., p. 72, Apx. at p. 552). Gordon admitted that he told Saltsman to let Campbell and the officers in (R. 51: Motion by Defendants, Exhibit 5, Gordon dep., pp. 14 Apx. at p. 258). He did so because of his fear that there was a risk that the children would be taken (R. 51: Motion by Defendants, Exhibit 5, Gordon dep. p. 3-5, 11, 13-14, Apx. at pp. 250-252, 256, 257-258).

As DeWitt and Campbell walked away from the house in the direction of Campbell's car, Henning went to the front door and knocked again (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 6-7, Apx. at pp. 224-225). Before Henning could say anything, Saltsman invited him in (R. 51: Motion by Defendants, Exhibit 3, Henning dep., pp. 6-7, Apx. at pp. 224-225). While Campbell examined conditions in the house (Campbell dep. p. 52-53, 55, 58) Henning and DeWitt stood near the front door (R. 51: Motion by Defendants, Exhibit 3, Henning dep. p. 5-8, Apx. at pp. 223-226). After a short time, all three left.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED WHERE THE SIXTH CIRCUIT CORRECTLY APPLIED THIS COURT'S FACT-BASED TEST AND EVALUATED THE TOTALITY OF CIRCUMSTANCES TO DECIDE CONSENT WAS VALID AND WHERE DIFFERING RESULTS IN THE CIRCUITS IS NOT DUE TO A CONFLICT BUT TO DIFFERENCES IN THE FACTS OF THE CASES.

A. This Court's totality of circumstances test best allows lower courts to decide consent in light of the multiplicity of factors that may be present in encounters between police and citizens.

This Court typically denies certiorari when review of a lower court decision is sought, that turns mainly on an analysis of the particular facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); *see also Texas v. Mead*, 465 U.S. 1041, 104 S. Ct. 1318, 79 L. Ed. 2d 714 (1984) (Stephens J.). And properly so. Given the volume of lower court decisions and the demands on this Court's time, review is granted where the law needs development and not where a litigant seeks additional review of a fact-based analysis with which he or she disagrees.

Despite this long standing policy, petitioners here urge the Court to grant a writ of certiorari because of their disagreement with the Sixth Circuit's application of this Court's totality of the circumstances test to the facts of this case. Perhaps realizing the difficulty in persuading this Court to grant a writ to correct claimed error, petitioners argue that the Sixth Circuit decision: (a) "creates substantial danger for the police and public; (b)

represents a forbidden bright-line test for Fourth Amendment analysis; and (c) it creates a split in the circuits." (Petition for a Writ of Certiorari, p. 9). In essence, petitioners contend that the Sixth Circuit has held that an attorney's advice to consent to a search outweighs any other factors and renders consent per se valid. Petitioners urge review to correct this claimed error. Petitioners argue that this Court should instead hold that when an attorney gives advice in response to a threat, it "must never be counted as a factor which cleanses the threat of coercion." (Petitioner for a Writ of Certiorari, p. 16). These issues do not warrant review because no further development of this Court's well-settled test is needed and, in any event, the issues are not squarely presented on this record.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." But the Fourth Amendment prohibition against unreasonable searches and seizures has no application to consensual encounters between police officers and citizens. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386, 115 L. Ed. 2d 389 (1991). This Court has repeatedly held that it is only by consideration of the totality of the circumstances that the voluntariness of a citizen's cooperation can be determined. *State v. Robinette,* 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996); *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870 64 L. Ed. 2d 497(1980).

This Court has been confronted with numerous opportunities to substitute a per se rule for the totality of the circumstances test. But this Court has rejected them because the current test is particularly suited to weighing the multiplicity of facts peculiar to any police-citizen encounter. *Michigan v. Chestnut*, 486 U.S. 567, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988); *Florida v. Reyer*, 460 U.S. 491, 506, 103 S. Ct. 1319

75 L. Ed. 2d 229 (1983). The test is predicated upon this Court's view that the

> purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals"

United States v. Mendenhall, 446 U.S. 544, 553-554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980) *quoting United States v. Martinez - Fuerte*, 428 U.S. 543, 554 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116 (1976). Notions of voluntariness reflect an accommodation of the complex values implicated in citizen encounters with police. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). This Court has maintained its totality of circumstances test to decide the validity of consent because it allows the courts to deal with these values as they arise in the myriad distinct encounters between citizens and police.

B. The Sixth Circuit explicitly refused to adopt a per se rule governing consent given on the advice of counsel.

The Sixth Circuit correctly applied the totality of circumstances test to conclude that Tina Saltsman freely and voluntarily consented to the search of her home. No further review is necessary. In an effort to conjure up some novel point of law, petitioners try to characterize the Sixth Circuit's ruling as one embracing a new bright-line rule. Petitioners concede that the Sixth Circuit Court of Appeals did not "declare an explicit 'per se' rule that an attorney's advice always purges police coercion . . ." (Petition for a Writ of Certiorari, p. 10). But petitioners assert that the pragmatic effect of the Sixth Circuit's decision is to create a bright line test (Petitioner for a Writ of Certiorari, p. 10).

Petitioners' argument is a classic example of circular reasoning or petitio principii. See generally, Thomas Walter Swan, "Hand," 57 Yale L.J. 107, 170 (1947). The question petitioners seek to answer is whether the Sixth Circuit has violated this Court's totality of the circumstances test by declaring an explicit per se rule, rather than weighing the totality of the facts. But petitioners assume that the Sixth Circuit has done so without establishing this by pointing to any statement in the opinion, which would prove the assumption. *See* Ruggero J. Aldisert, Logic for Lawyers, p. 11-30 (1992).

And statements in the opinion explicitly announce that no bright-line rule has been adopted. Petitioners assert that the Sixth Circuit embraced a "de facto 'bright-line' rule immunizing all entries as consensual whenever an attorney has given advice to permit the search" (Petition for a Writ of Certiorari, p. 10). This assertion is inconsistent with the Sixth Circuit's careful fact-based analysis of a whole series of factors. The court explicitly announced that "the fact that Mrs. Saltsman was conferring with her attorney is not dispositive . . ." (Opinion, 69 n. 1). This Court need not grant a writ of certiorari to correct the claimed error because it did not occur. Petitioners urge this Court to take the case to announce that an attorney's advice to consent does not per se immunize the consent. But since that position was never adopted by the Sixth Circuit, it makes no sense to grant the writ to correct it.

C. This Court should not try to fashion a per se rule governing consent when an attorney's advice follows a threat.

After urging this Court to hear the case because the Sixth Circuit has erroneously embraced a per se rule finding consent on an attorney's advice to be valid, petitioners argue that "an exception" must be declared that would prohibit weighing the lawyer's advice as a factor in favor of consent if it was preceded

by a threat. Careful analysis of petitioner's argument reveals that what they truly seek is a bright line rule that a "threat" to take one's children or to get in one way or another is sufficiently coercive that, if such a threat has been made, consent can never be given voluntarily, despite an attorney's advice.

Such a rule would be contrary to this Court's repeated endorsement of a totality of the circumstances test and its refusal to adopt a series of per se rules to govern the analysis of whether a consent is voluntary. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Petitioners argue that absent a per se rule providing an exception, consent will always be considered valid if an attorney advises the citizen to consent. But the Sixth Circuit has neither explicitly nor implicitly adopted such a rule. It is petitioners who seek a per se rule. In essence, what petitioners want the Court to do is to hold that a lawyer's advice to consent must be ignored if it comes after a threat.

Petitioners assert that if a police officer says "open or I'll shoot," the lawyer may urge his client to consent to avoid possible bloodshed. This should not, in petitioners' view, be deemed a voluntary consent. The hypothetical only underscores the fact-based nature of the inquiry and the importance of engaging in the kind of multi-factored analysis that this Court presently requires. The record in this case did not contain any hint of physical force. No weapons were drawn. No voices were raised. And the officer's statement that they would get in one way or another was understood by Mrs. Saltsman to mean that if they didn't get in, they would have to get a court order. The totality of the circumstances here gives a far different picture than petitioners' hypothetical in which physical force has been threatened and consent is given to avoid an altercation.

The discussion only highlights this Court's wisdom in refusing to decide consent by a series of per se rules. Such per

se rules will never be able to capture the myriad factual nuances in each unique encounter. And efforts to do so will fail to adequately analyze the endless variations in the facts and circumstances. No litmus paper test can be devised to distinguish when an attorney's advice is in response to a lawless but real threat of violence and when an attorney's advice represents a thoughtful and considered suggestion that cooperation with the government actor is in his or her client's best interest. Even in the discrete category of threats followed by an attorney's advice to consent, it is unlikely that this Court can reduce to a rule the question of whether a consent was voluntary. Rather, the rule should remain a broad fact-based analysis of the totality of the circumstances.

Petitioners claim that the Sixth Circuit's rule places police officers, citizens, and the rule of law in grave danger. Conjuring up a vision of physical confrontations between officers and citizens, petitioners characterize the attorney's advice as an effort to defuse a potentially dangerous situation. But this argument amounts to the setting up of a strawman. There is no suggestion in the record that any "deadly confrontation" was in the offing. Nothing in the record suggests that the Saltsmans were at physical risk. Petitioners argue that Gordon's advice was given in the tradition of the rule of law. They assert that the "lawyer's counsel to yield to an improper police threat so that the matter may be resolved later in a court must never be counted as a factor which cleanses the threat of its coercion" (Petition for a Writ of Certiorari, p. 16). They contend that lawyers should be encouraged "to defuse volatile situations" by deferring to illegal demands.

But the situation outside the Saltsmans' home was not volatile. There were no threats of force or physical violence. While Mrs. Saltsman was fearful of losing her children, she did not anticipate that the social worker and officers would

break down the door. One officer and the social worker had moved away from the house when she spoke with her lawyer.

If this Court has any interest in considering whether a threat of force should vitiate consent on advice of counsel, this is not the case to hear. More importantly, the totality of the circumstances test allows for consideration of precisely these kinds of facts. It does so in a multi-factored way that allows the courts to consider the type of threat, the question of whether it involved physical force or violence, and other factors in the particular circumstance that would bear upon the voluntariness of consent.

D. The differing results reached in cases cited by petitioners are not based on a split in the circuits but differing results due to differing facts.

Petitioners also urge this Court to grant a writ to resolve a split in the circuits concerning the determinative nature of a lawyer's advice to allow entry on the issue of the voluntariness of consent. Petitioners contend that *United States v. Molt*, 589 F.2d 1247 (3rd Cir. 1978) and *Huotari v. Vanderport*, 380 F. Supp. 645 (D. Minn. 1974) conflict with the Sixth Circuit's decision in this case. But all of these cases hold that an attorney's advice is not determinative of the voluntariness of consent.

In *Molt*, the Third Circuit Court of Appeals upheld a district court ruling that Molt's consent was not voluntary based on the totality of the circumstances. 589 F.2d at 1251. The district court concluded that the customs agents innocently misrepresented their right to search Molt's premises, telling him that they could get a warrant if he refused when, in fact, the statute they relied on only required Molt to appear before the agents to give testimony. 589 F.2d at 1250. Although Molt's

attorney advised him to consent, this did not necessarily make consent valid because Molt's belief that he must consent was due to the government's misrepresentation, which was an important factor in deciding to consent. 589 F.2d at 1251.

The Third Circuit concluded that overturning the district court's decision "would be tantamount to holding that, as a matter of law, consent based on an attorney's advice must be voluntary." 589 F.2d at 1252. This, it declined to do. *Molt* is not therefore inconsistent with *Saltsman*. In both, the court applied the totality of circumstances. In both, the court explicitly refused to rule that consent based on an attorney's advice must always be voluntary. In each, the court weighed the unique and complex factors presented to conclude that the consent was valid.

Nor is *Huotari v. Vanderport*, 380 F. Supp. 645 (D. Minn. 1974) in conflict with this case. In *Huotari*, the record showed a factual dispute. The officers concede that the plaintiff asked for a warrant but then testified that she invited them in. The plaintiff, on the other hand, testified that she did not wish to invite the officers in unless the law compelled her to do so. No attorney's advice was involved, although an attorney was on the phone with the plaintiff's son. The district court applied this Court's totality of circumstances and, given the inconsistencies and factual disputes in the record, ruled that the officers failed to show that consent was voluntary.

This does not conflict with *Saltsman*. Petitioners believe that the *Huotari's* officer's statement that the officers would conduct the search no matter what is analogous to the statements allegedly made in *Saltsman*. But the totality of circumstances in *Saltsman* showed that Tina Saltsman did not understand the statement to mean she was compelled by law to let the officers in. She knew that she could refuse. In contrast, the *Huotari*

court concluded that plaintiff may have thought she was compelled by law to consent to entry. As a result, the *Huotari* court reached a differing result.

These decisions do not reveal a split in the circuits. Rather, they demonstrate that federal courts have applied a fact-based analysis to the totality of circumstances in several cases which, on the differing facts, resulted in differing conclusions as to the voluntariness of the consent. These fact-based rulings do not require review or reflect a split in the circuits. Accordingly, a writ for certiorari should be refused.

CONCLUSION

Based on the foregoing analyses and citations to authority, respondents respectfully request that this Court deny petitioners' request for a writ of certiorari and refuse to hear this case.

Respectfully submitted,

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